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¹ No formal evaluation is required of a coach or as to any other extra service duty. Board of Educ. of Erlanger-Elsmere v. Code, 57 S.W.3d 820 (Ky. 2001).

2. 704 KAR 3:345 Evaluation guidelines

KRS 156.557(1) requires the Kentucky Board of Education to establish standards for evaluation and support for improving the performance of all certified school personnel.

B. Classified employees — KRS 161.011(9)

The statutory law on classified employees does not mandate the development of a system of evaluation; rather, local boards of education are required to develop written policies that address among other areas, “terms and conditions of employment” and “employee rights.”

1. Most boards of education in Kentucky have adopted a policy for the evaluation of classified employees and administrative procedures specifying the frequency and time, process, form, and evaluation appeal. *See*, generally, Board Policy 03.28; 03.28 AP.1; 03.28 AP.21; 03.28 AP.22.

II. The Evaluation System

A. Content of evaluation system — certified employees

1. KRS 156.557(3)(a) requires each certified employee to be evaluated by a system developed by a local school district and approved by the Kentucky Department of Education.

- a) the local school district evaluation plan, that includes procedures and forms, is to be developed by a committee composed of an equal number of teachers and administrators
- b) KRS 156.557 does not define the term “evaluation,” but a definition is provided in 704 KAR 3:345, Section 1(3):

“‘Evaluation’ means:

(a) The process of assessing or determining the effectiveness of the performance of the certified employee in a given teaching and learning or leadership and management situation, and based on predetermined criteria, through periodic observation and other documentation including a portfolio, peer review, product or performance; and

(b) The establishment and monitoring of a professional growth plan.”

- 1) the local evaluation system is required to include the process of a “formative evaluation” and “summative evaluation” and those two terms are statutorily defined:

“‘Formative evaluation’ means a continuous cycle of collecting evaluation information and interacting and providing feedback with suggestions regarding the certified employee’s professional growth and performance.

“‘Summative evaluation’ means the summary of, and conclusions from, the evaluation data, including formative evaluation data, that:

- a. Occur at the end of an evaluation cycle; and
- b. Include a conference between the evaluator and the evaluated certified employee, and a written evaluation report.”

KRS 156.557(3)(b) 1. and 2.

- c) the immediate supervisor of the certified employee shall be designated as the primary evaluator — KRS 156.557(c) 2.
- d) monitoring or observation of performance is to be conducted openly and with full knowledge of the certified employee — KRS 156.557(c) 3.
- e) assistance is to be given for professional growth as a teacher or administrator and must also specify the processes to be used when corrective actions are necessary in relation to the performance of assignment — KRS 156.557(c) 5.

- 1) a professional growth plan is required for all certified personnel (superintendent excluded) aligned with specific goals and objectives of the school improvement plan or the district improvement plan and is to be reviewed annually — 704 KRS 3:345, Section 4(2)(c)
 - f) a formative evaluation conference between the evaluator and teacher/administrator is to occur within one week following each evaluation; the summative evaluation conference must be held at the end of the evaluation cycle and include all evaluation data — 704 KAR 3:345, Section 4(2)(e)
 - g) the nontenured certified employee is to be evaluated with multiple observations annually — 704 KAR 3:345, Section 4(2)(f)
 - h) a summative evaluation shall occur a minimum of once every three years for each tenured teacher; however, multiple observations are to be conducted with a tenured certified employee whose observation results are unsatisfactory — 704 KAR 3:345, Section 4(2)(g) and (h)
 - i) a summative evaluation shall occur annually for an administrator — 704 KAR 3:345, Section 4(2)(I)
 - j) the evaluation criteria and process, *i.e.* the locally adopted certified employee evaluation plan, must be explained to and discussed with certified personnel no later than the end of the first month of reporting for employment each school year — 704 KAR 3:345, Section 5(2)
2. KRS 156.557(5) and (6) — the availability for an appeal of the evaluation
- a) each local board of education must establish an evaluation appeals panel to consist of two members elected by the certified employees of the school district and one member appointed by the board of education

Note: the local evaluation appeal panel (LEAP) should be in existence each school year long before the end of the school year when an appeal might be taken

Note: while each evaluator is to be trained, tested, and approved in accordance with Kentucky Board of Education regulations as to the proper techniques for effectively evaluating certified school employees, there is no legal requirement the LEAP members be so trained but the board of education appointee, likely a central office administrator, can be so trained and tested

- 1) the appeal to the LEAP must be a hearing conducted after proper notice of the hearing date and time, a sufficient period preceding the hearing to gather evidence to support the certified employee's position, and with the right to present expert testimony and engage counsel to assist in the presentation of the employee's position; the certified employee (and evaluator) is entitled to the opportunity reasonably in advance of the hearing for the adequate review of all documents that are to be presented to the LEAP — 704 KAR 3:345, Section 7; Thompson v. Board of Educ., 838 S.W.2d 390 (Ky. 1992)
 - 2) the burden of proof should rest upon the certified employee who has appealed his/her evaluation; the appealing certified employee should be the first to present oral testimony to the LEAP
 - 3) the LEAP hearing should be audio recorded
 - 4) the superintendent should contemplate the likelihood the evaluator will request representation by legal counsel at the hearing (and before) to be paid for by the school district; by like token, the LEAP is likely to request the assistance of legal counsel paid for by the school district
- b) if the evaluated certified employee believes the school district, through the evaluator, has failed to properly implement the evaluation system, but such specifically does not include a review of the judgmental conclusions of their evaluation, an appeal to the Kentucky Board of Education for a State evaluation appeal panel (SEAP) review can be taken within thirty (30) days of the LEAP's final decision — 704 KAR 3:345, Section 9
- 1) a determination by the SEAP of noncompliance, procedural error of the magnitude to have caused substantive detriment to the certified employee, will result in the evaluation being held void and the certified employee will have the right to be reevaluated — 704 KAR 3:345, Section 9(2)(e)

B. Content of the evaluation system — classified employees

1. The process of the evaluation, timing, evaluator, appeal (if any), is totally dependent upon local board of education policy and procedure

III. The Evaluation Under Attack

A. Certified employees

1. nontenured certified employees

- a) if a nontenured certified employee's employment is nonrenewed not later than May 15 pursuant to KRS 161.750(2), there is entitlement of the certified employee to request the superintendent to provide a written statement "containing the specific, detailed, and complete statement of grounds upon which the nonrenewal of contract is based"
- 1) the local school district evaluation process should be completed, including any appeal of the evaluation to the LEAP, a reasonable period of time preceding May 15
- 2) the superintendent is at the mercy of the evaluator
- 3) caution must exist for a superintendent in determining to nonrenew the employment of a nontenured certified employee based upon evaluation(s)

Note: an appeal of an evaluation to the Kentucky Board of Education will not be heard and decision rendered until well after May 15; if the superintendent has provided in writing to the certified employee that "a" or "the" reason for nonrenewal of employment is job performance as reflected in the evaluation, and that evaluation is voided by the SEAP, the basis for the nonrenewal is gone and the possibility of reinstatement to employment is legally plausible.

Note: there appears to be an ongoing effort to establish by case law that a nonrenewed, nontenured certified employee has a cause of action available in circuit court against the superintendent with the claim being the specific, detailed, and complete statement of grounds are not such, or, are simply untrue; *cf.* the decision in Kidd v. Board of Educ. of McCreary County, 29 S.W.3d 374 (Ky. 2000), as to classified employees, *infra*

- b) even if a nontenured certified employee's conduct and job performance would support termination before the end of the school year under KRS 161.790, the fact the superintendent may opt to discharge the nontenured certified employee by the "easier" method of nonrenewal rather than instituting a termination proceeding is of no significance — Evans v. Montgomery County Bd. of Educ., 712 S.W.2d 358 (Ky.App. 1986)
- c) the "Garcetti effect" and the First Amendment
 - 1) a typical First Amendment case involves a teacher whose performance has been evaluated and is essentially "acceptable" or is "mixed" as to the evaluation standards, yet the evaluator has verbally told the certified employee about performance problems but has not reduced them all to writing² and thus has not done his/her job properly
 - 2) the teacher has engaged in public speech critical of the evaluator, the "administration," and/or the local board of education and subsequently is "written up" (evaluated) for poor performance and thereafter employment is nonrenewed

- 3) the teacher initiates litigation claiming protected First Amendment speech activity and that the nonrenewal of employment (or termination) is in retaliation for the protected speech
 - 4) the United States Supreme Court in Garcetti v. Ceballos, 547 U.S. 410 (2006) has held speech by an employee is “protected speech” if the employee can show the speech was not made in connection with his/her “official duties” and the speech touches on a matter of public concern; *see, also*, Baar v. Jefferson County Bd. of Educ., 311 Fed.Appx. 817 (6th Cir. 2009)
 - 5) without documentation of poor performance prior to the certified employee participating in the protected speech activity, it becomes more difficult to establish that a poor evaluation³ and perhaps adverse personnel action were not in retaliation for the exercise of the constitutionally protected rights
- d) Kentucky’s Whistleblower Act — KRS 61.101 *et seq.*, prohibits reprisal, retaliation, discrimination against an employee who in good faith reports, discloses, divulges, or otherwise brings to the attention of various State agencies, law enforcement, “or any other appropriate body or authority,” including a superior within the State agency (school district), any facts or information relative to an actual or suspected violation of law, regulation, etc.
- 1) no personal liability, but reinstatement of employment with back wages are available and, as well, punitive damages against the board of education (governmental immunity waived)
2. tenured certified employees
- a) *see* above as to nontenured certified employees
- b) KRS 161.790(1)(d) does provide that “inefficiency, incompetency, or neglect of duty” is a basis for the termination of employment, or public reprimand, or suspension without pay, “when a written statement identifying the problems or difficulties has been furnished the teacher . . .”
- 1) it is exceedingly difficult to prevail when adverse personnel action has been taken against a tenured certified employee for job performance issues that triggers the opportunity for a tribunal review

B. Classified employees

1. classified employees with less than four years of continuous active service
 - a) a “nontenured” classified employee may have their employment nonrenewed by written notice not later than May 15 for essentially any reason that is not otherwise illegal
 - 1) the less than four years of continuous active service classified employee has ten days to request the “reasons for nonrenewal” — KRS 161.011(5)(a)
 - 2) the reason(s) may be for performance issues set out in the evaluation
 - 3) statutory law does not but typically board policy does provide for the opportunity for an evaluation appeal; the classified employee may also file a grievance over his/her negative evaluation and nonrenewal of employment
 - 4) *see* Kidd v. Board of Educ. of McCreary County, *supra*, where Kentucky Court of Appeals determined even a “nontenured” classified employee had a right of action in circuit court to assert the reason(s) for the nonrenewal of employment were untrue

³ Primes v. Reno, 190 F.3d 765 (6th Cir. 1999) – negative performance evaluation, in and by itself, is not actionable adverse employment action.

- b) the “Garcetti effect” and Kentucky Whistleblower Act type of claims are available to the nonrenewed classified employee with less than four years of continuous active service
2. classified employees with four or more years of continuous active service
- a) a “tenured” classified employee may have their employment nonrenewed not later than May 15 for only those causes (reasons) set forth in KRS 161.011(7) which does include “incompetency, neglect of duty, insubordination, inefficiency,” that is work performance reasons reflected on an evaluation — KRS 161.011(5)(b)
 - 1) while the classified employee with four or more years of continuous active service has no entitlement to a hearing to challenge an evaluation, the “tenured” classified employee who is nonrenewed is entitled to request “a specific and complete written statement of the grounds upon which the nonrenewal is based,” AND, is entitled to an adversarial due process hearing before a neutral and impartial hearing officer (not superintendent) with the right to examine witnesses, present testimony, and representation by legal counsel of his/her choosing. *See, generally, Mitchell v. Fankhauser*, 375 F.3d 477 (6th Cir. 2004)
 - b) *see Kidd*, the “Garcetti effect,” and Kentucky Whistleblower Act type of claims that are also available to the “tenured” classified employee who is nonrenewed for job performance evaluation issues

CONCLUSION

Evaluating school employees may indeed be a dreaded task, but the repercussions for not doing them right may very well lead to dire legal consequences.

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